Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

BILLY WAYNE COX,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court erred in its calculation of the loss under the United States Sentencing Guideline § 2F1.1 in determining the sentence, by interpreting "intended loss" to mean a conscious indifference or recklessness as to the loss.

2. Whether the evidence was insufficient to prove a violation of 18 U.S.C. § 1344(2) in Count 15 of the indictment.

LIST OF PARTIES

Petitioner -	Billy Wayne Cox
Co-Defendants -	Tammy Denise Morrow Larry Wayne Meinzer Alice Marie Barber Samantha G. Davis Arnold Gene Trout Mason Long Darrell Paul Freeman James Michael Caldwell Patrick Gene Malmstrom Max Waylan Cain, Sr.
Respondent -	United States of America

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at ***U.S. vs. Morrow, et al***, 177 F3d 272, (5th Cir., 1999). It is copied in the Appendix.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was issued on May 25, 1999. No Petition For Rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Question One

The first question at bar relates to the calculation of loss under United States Sentencing Guideline § 2F1.1 for fraud offenses arising under 18 U.S.C. § 1344(2).

18 U.S.C. § 1344 provides:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice -

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

United States Sentencing Guideline § 2F1.1 provides:

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000. Increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3

(E)	**More than $20,000**	**add 4**
(F)	**More than $40,000**	**add 5**
(G)	**More than $70,000**	**add 6**
(H)	**More than $120,000**	**add 7**
(I)	**More than $200,000**	**add 8**
(J)	**More than $350,000**	**add 9**
(K)	**More than $500,000**	**add 10**
(L)	**More than $800,000**	**add 11**
(M)	**More than $1,500,000**	**add 12**
(N)	**More than $2,500,000**	**add 13**
(O)	**More than $5,000,000**	**add 14**
(P)	**More than $10,000,000**	**add 15**
(Q)	**More than $20,000,000**	**add 16**
(R)	**More than $40,000,000**	**add 17**
(S)	**More than $80,000,000**	**add 18**

(2) If the offense involved (A) more than minimal planning or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization or a government agency or (B) violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense -

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense.

Increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

Commentary

Statutory Provisions: 7 U.S.C §§ 6,6b,6c,6h,6o,13,23; 15 U.S.C. §§ 50,77e,77q,77x,78j,78ff,80b-6, 1644; 18 U.S.C. §§ 225,285-289, 471-473,500,510,659,1001-1008,1010,1014,1016-1022,1025,1026,1028,1029,1031,1341-1344,2314,2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.

2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).

3. **"Scheme to defraud more than one victim." As used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.**

4. **Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses a federal collection agent in order to collect a delinquent student loan.**

5. **Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was**

previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed while on Release) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).

6. **Some fraudulent schemes may result in multiple-count indictments depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).**

7. **Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of § 2X1.1 (Attempt Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities or representing that a forged check for $40,000 was genuine, the loss would be $40,000.**

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(a) **Fraud Involving Misrepresentations of the Value of an Item or Product Substitution**

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000 the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) **Fraudulent Loan Application and Contract Procurement Cases**

In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's

reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001) the loss is the difference between the legally required and actual wages paid.

8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's

gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy) or both; see Application Note 4 in the Commentary to §2X1.1.

10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

(b) false statements were made for the purpose of facilitating some other crime;

(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important institution;

(f) the offense involved the knowing endangerment of the solvency of one or more victims.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

11. Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship or legal resident status, apply § 2L2.1 or § 2L2.2, as appropriate rather than § 2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

12. If the fraud exploited vulnerable victims, an enhancement will apply. See § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).

13. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001 or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions for which § 2S1.3 would be more apt and false statements to a customs officer for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes or other relatively broad statutes are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where

a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases § 2F1.1 is to be applied but a departure from the guidelines may be considered.

14. **"Financial institution" as used in this guideline is defined to include any institution described in 18 U.S.C. §§ 20.656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan association; union or employee pension fund; any health, medical or hospital insurance association, brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission, and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association." As used above primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g. medical or hospitalization insurance) to large numbers of persons.**

15. **An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent, substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.**

16. **"The defendant derived more than $1,000,000 in gross receipts from the offense" as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).**

17. **If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprises), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."**

18. **If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."**

Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result

of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of pre-guidelines practice showed that the most important factory that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

Use of false pretenses involving charitable causes and government agencies, enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(6)(A) implements, in a broader form, the instruction to the Commission in Section 961 (m) of Public Law 101.73.

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988. (see Appendix C, amendment 30). November 1, 1989 (see Appendix C, amendment 154-156 and 303). November 1, 1990 (see Appendix C, amendment 317). November 1, 1991 (see Appendix C, amendments 364 and 393). November 1, 1992 (see Appendix C, amendment 470). November 1, 1993 (see Appendix C., amendments 481 and 482). November 1, 1995 (see Appendix C, amendment 513).

QuestionTwo

The second question presented involves 18 U.S.C. § 1344(2) in Count 15. This is the bank fraud statute which requires a false pretense, representation, or promise as an element of the offense.

18 U.S.C. § 1344 provides:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice -

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

On November 20, 1995, a Grand Jury in the Midland Division of the Western District of Texas returned a 16 count Superseding Indictment against Petitioner Billy Wayne Cox, Jr. and 12 other defendants. All defendants were charged with conspiracy to commit bank fraud and various substantive counts.

Billy Wayne Cox, Jr. was charged in Count 1 of the indictment with conspiracy to violate Title 18 United States Code § 1344(2). Cox was charged in Count 3 pursuant to Title 18 U.S.C. § 2 and § 1344(2). These allegations involved the conspiracy to commit and the alleged substantive commission of bank fraud, primarily by submitting false information on loan applications to H.S.A. Mortgage Company in Midland from potential customers at mobile home franchise lots owned by Cox.

Petitioner was charged in Count 15 with a violation of 18 U.S.C. § 2 and § 1344(2), bank fraud, involving the purchase of certain mobile homes that Cox bought from an entity known as Starks Brothers. Finally, Cox was charged in Count 16 with a violation of

18 U.S.C. § 2 and § 1344(1) with bank fraud in relation to a certain mobile home lot in Roswell, New Mexico.

Prior to trial, two defendant, Roy Barker and James Cox, (unrelated to Billy Wayne Cox) entered guilty pleas.

Trial commenced on April 8, 1996 before the honorable Royal Ferguson. The trial lasted approximately 9 weeks. Billy Wayne Cox, Jr. was convicted on Counts 1, 3, and 15. Cox was acquitted on Count 16.

On January 25, 1997, the court sentenced Petitioner to serve 60 months on Count 1 and 60 months on Count 3 to run concurrently, followed by a term of 3 years supervised release. The Court further ordered that Petitioner serve 10 months in prison on Count 15 and that that sentence run consecutively with the time served on Counts 1 and 3. The Court did not impose a fine but did order $600,000.00 in restitution.

The United States Court of Appeals for the Fifth Circuit affirmed petitioner's conviction on May 25, 1999. This Petition For Writ of Certiorari follows.

The evidence showed that Max Cain, Sr. was employed in late 1980's by Home Savings Association and its successor institution, Banc Home Savings Association. Cain also held a position with H.S.A. Mortgage Company as head of the mobile home lending operation.

The relationship between H.S.A. Mortgage and Banc Home was convoluted. In fact, employees who worked for H.S.A. Mortgage believed that they were working for Banc Home Savings. Throughout trial the references were sometimes used interchangeably.

The evidence reflected that Petitioner Billy Wayne Cox was a franchise holder of A-1 Mobile Homes. Cox owned four A-1 franchises. These were located in Bryan, Nacogdoches, and Waco, Texas, as well as Roswell, New Mexico. A-1 had numerous corporate dealerships and franchisees throughout America and was the largest dealer in the Southwest.

A-1 Mobile Homes, Inc. was a wholly owned subsidiary of Home Savings and later Banc Home.

The evidence reflected that John Bushman, uncharged and a witness for the government in this case, was the primary owner and

chief executive officer of Home Savings, Banc Home, H.S.A. Mortgage Company, A-1 Mobile Homes, Venerable Insurance and High Chaparral Mobile Homes, a manufacturer of mobile homes.

The record showed that A-1, Inc., was formed by Bushman in 1970. In 1981, Bushman bought Home Savings and Loan Association which later merged with Citizens Savings and Loan. In 1985, Bushman merged A-1, Inc. with Banc One Savings Association and the organization became Banc Home. H.S.A. Mortgage, Inc., a subsidiary of Banc Home was formed in the mid 1980's primarily to handle the servicing of mobile home loans. Banc Home was closed down by federal regulators in October, 1988. There was no evidence that Cox participated in falsifications after that point.

Petitioner Billy Wayne Cox, Jr., was at one time partners with co-defendants Mason Long and Bob Harvey. Together, the three owned A-1 franchises. Harvey testified for the government. Harvey testified that Petitioner Billy Wayne Cox, Jr. ordered and encouraged falsification on credit applications which the dealership furnished to H.S.A. Defendants Alice Barber, Sammy Davis, Darrell Freeman, Arnold Trout, Mike Caldwell, Larry Meinzer and Tammy Morrow,

all worked at A-1 Mobile Home lots owned by Petitioner and Long. The evidence showed that Defendant Rick Malmstrom worked at the Waco lot, only after Billy Cox sold his Waco A-1 franchise to another individual.

The government spent the bulk of its case proving that there were misstatements and falsehoods on the loan applications completed by various purchasers of mobile homes. The government proved that salespersons instructed and encouraged purchasers to make these misstatements. The evidence showed overwhelmingly that Billy Cox likewise encouraged and instructed salespersons and purchasers on how to falsify loan applications. The government's evidence showed that Defendant Max Cain was aware of the false statements, encouraged such false statements and received monies from certain sales and transactions.

As a course of business, the applications containing falsehoods would be faxed to H.S.A. Mortgage Company. H.S.A. Mortgage Company would then approve or reject the loan.

It was Petitioner Billy Cox's defense at trial, not that misstatements and falsehoods had not occurred on applications, but

that he lacked the intent to defraud the institution because he believed he had the knowledge and consent of the controlling interests and officers in the institution, specifically Bushman and Cain, in falsifying the applications. The defendants who were sales persons had the position at trial that they were not involved in the misstatements.

Cox spent his efforts in this trial, as related to Counts 1 and 3, in an attempt to show that Cox believed that Cain and Bushman had knowledge of the falsity and the reasonableness of this belief in order to contradict the required culpable mental state of an intent to defraud the lending institution.

Robert Harvey, who testified on behalf of the government, testified that he believed that officials with H.S.A. were aware of the falsifications.

Cox called Sue Turpinat as a witness. She had previously been employed as a loan officer by H.S.A. Mortgage Company. She testified that the conditions at H.S.A. made it impossible to check the accuracy of loan applications. She also found that there were numerous instances of loan applications containing false information

that had nothing to do with Defendant Billy Cox. These were applications from other A-1 franchise dealers.

She testified that she told her superiors at H.S.A. about the inaccuracies in the loan applications. She testified that there was an automatic approval policy for customers who had one-third of the down payment. She was concerned that the one-third automatic approval policy was an encouragement to fraudulent applications.

For example, a person would make an application and not have enough credit. The application would be resubmitted and would show that the applicant was putting down one-third of the total cost and therefore the application was automatically approved.

Counsel for Cox showed Turpinat many of the fraudulent applications that had been submitted from Cox's A-1 lots. These had been introduced at trial by the government. As a prudent loan officer she said that seeing persons with such limited assets being able to provide the one-third down payment for automatic approval would raise serious questions in her mind about the accuracy of the down payments. She testified that she would go to Max Cain with the

information concerning the number of false applications being received. Turpinat was asked,

> **QUESTION: "In your opinion was this a system at H.S.A. that was designed to fail or that had the effect of failing? What I am talking about is the automatic approval program, the four hour turn around, and the relook program taken together".**
>
> **ANSWER: "I think putting all those together, I can see, yes, where it can be designed to fail".**

She was further asked,

> **QUESTION: "Inside, did you often suspicion that those were loans with false down payments?"**
>
> **ANSWER: "Oh yes I did... I don't think I hid it from anyone. I think all of us felt the same way."**

Bob Peterman who was with the Texas Department of Licensing and Regulations for the mobile home industry also testified for the defense. He testified that A-1 Mobile Homes in the 1980's was the largest mobile home dealer in the state of Texas. He testified that he was familiar with the reputation for truth and veracity in the mobile home community of John Bushman (who testified for the government) and that reputation was not good.

The defense called Donna Windham. She testified that she had worked for H.S.A. Mortgage from 1984 to 1989 as a loan officer

and manager of the credit department. She testified that the policies of H.S.A. were not conducive to good banking policies. She stated that she complained about policies such as having to give a credit answer within four hours of the application being received by H.S.A.

She did not work the lots involving Billy Wayne Cox but found numerous instances of falsification on credit applications from other lots. She believed that false down payments were being submitted. She believed that the automatic approval program encouraged false down payments to be submitted. She testified that the automatic approval program and the four hour turn around program were instituted by John Bushman.

She stated that it was common to refer to all entities owned by Bushman, which included H.S.A. Mortgage which financed the mobile homes, Venerable Insurance which insured the mobile homes, A-1 which sold the mobile homes and High Chaparral which manufactured the mobile homes, as parts of the A-1 family.

She testified that the work H.S.A. did for dealers other than A-1 had different rules and regulations. There was no four hour turn

around policy on those dealers nor was there an automatic approval program nor a relook program.

Bushman was chairman of the board at Banc Home. He was chairman of the board at A-1. He owned H.S.A. Bushman admitted on cross-examination that he was very involved in the mobile home aspect of A-1. Memos from Bushman to A-1 dealers were introduced. One memo stated,

> **"The marketing theme of our company is, Just bring what you can and we will get you in a mobile home". or put another way, "Bring whatever you have, but all you have, and we will handle the rest...This theme or slogan has many, many implications but you only get the benefit if you expound on this theme as often as possible by phone, writing or face to face with a customer... It gives the customer hope that he can own a home regardless of his circumstances".**

Also introduced was a memo on A-1 letterhead from Bushman showing a policy of attempting to induce other dealers to refer their financial rejects to A-1. A-1 also had a policy which gave "shopping sprees" to customers. A-1 sold more houses than any other company in the Southwest. It sold twice as many as its nearest competitor and in 1987 sold approximately 1500 mobile homes per quarter.

Bushman testified that he had a vertical integration system in that his companies built the mobile homes, sold the mobile homes, insured the mobile homes and financed the mobile homes.

Another franchise dealer, Gary Lambeth, testified for the defense. In the late 1980's he was an A-1 franchise dealer in Idabel, Oklahoma. He testified that financing of mobile homes was very difficult to obtain in the 1980's. He said that the man who sold him the A-1 franchise was a Mr. Gerrard. Gerrard told him that financing would be easier with A-1 because the people that owned A-1 owned the mortgage company and it was one big package. He was told that John Bushman owned A-1 and the Venerable Insurance Company as well as H.S.A. Mortgage.

Tom Hampton was an A-1 representative from A-1 Corporate Headquarters. Bushman was the chairman of A-1, Rick Carver was the President and Tom Hampton the vice-president. It was always emphasized to Lambeth that A-1, H.S.A., High Chaparral, and Venerable were all one team. Lambeth stated that Hampton told him that there was an automatic approval program with one-third down payment and the profit was such that it didn't matter if there was no

down payment actually made because you could throw away the down payment and still make a decent profit. It was reasonable to believe that Hampton was encouraging him to do short downs.

Another A-1 Corporate Official, Gary Hinkle, also explained to Lambeth how to falsify the verification of deposits so that he could loan the buyer money which the buyer would then turn around and pay back to him. A-1 encouraged volume sales and A-1 Corporate advertised $99.00 down payments to move into a house but Lambeth never recalled seeing a legitimate $99.00 down deal. Lambeth stated that in his mind he believed the "head of the team (Bushman) was cognizant and aware of how the team was playing the game". He had no fear that he would get into any trouble with H.S.A. Mortgage for falsifying loan applications as long as John Bushman was the chairman. Lambeth further testified that the purpose of the fraudulent applications wasn't to fool the bank but rather to make the paper look good.

The evidence showed that Bushman's associates, including his children, accountant, and friends, made up the Board of Directors of Banc Home. Dwayne Epting testified that he was Bushman's

accountant and board member of Banc Home Savings and was familiar with a lawsuit involving American Bankers Trust.

That lawsuit involved a period from 1981 to 1985, prior to Billy Cox's association with A-1. American Bankers refused to pay on all of the loans that had gone into default because they contended that Banc Home and H.S.A. were in collusion with A-1 dealers in accepting fraudulent loans. Numerous depositions of purchasers from that time period were taken pursuant to that lawsuit. They contended that they did not make the down payments that were shown on the applications sent to H.S.A. Former employees of A-1 during that time testified that it was the policy of A-1 to give over allowances so that if a person brought a trailer in worth $500.00 as a trade-in, they would give that person $2,500.00 as an over allowance.

American Bankers also alleged that the manufacturer of mobile homes, owned by Mr. Bushman, was making the first payments for the purchasers. A-1 was the largest seller of mobile homes in the Southwest with gross revenues close to $100,000,000.00 in 1986. Epting admitted that one of the reasons that A-1 was so large was its ability to get customers financed.

Evidence was also introduced that Billy Cox's father had asked him at one point if he would get in trouble due to all of the falsifications. Petitioner Cox replied that it was all right because the bank and Mr. Bushman knew of the falsification.

Cox, Sr. further testified that Petitioner Billy Cox told him that he wasn't trying to get around the bank because Mr. Bushman knew. Cox, Sr. also stated that he heard Max Cain urging Cox that the bank needed more paper.

Cox put into evidence the Texas Savings and Loans audits in the mid to late 1980's showing the poor condition of Home Savings and Banc Home, unrelated to the mobile home sales and the amounts of money going to John Bushman and to related companies. It was the defense position that Bushman was essentially looting the Savings and Loan.

Petitioner Billy Wayne Cox was also charged in Count 15 of the indictment with a violation of 18 U.S.C. 1344(2) in that by means of materially false and fraudulent pretenses, representations, and promises, he defrauded Banc Home in the purchase of 16 mobile

homes from Starks Brothers, Inc. The evidence in regards to that count conflicted with the allegations made in the indictment.

The evidence as to Count 15 showed:

Kenneth Starks owned Starks Mobile Home Sales and he sold mobile homes in bulk to A-1 lots owned by the Cox. He sold 16 mobile homes to Petitioner Billy Cox for a total of $93,176.00. These were all preowned homes, some in good condition and some in bad condition. He was wired $93,176.00 by H.S.A.

Charlene Henderson testified that she worked at Home Savings during this time and worked for Max Cain. She stated that Cain was in a hurry to get the Starks transaction floorplanned. She testified that bank policy allowed H.S.A. to floorplan or finance a dealers purchase of used mobile homes at 60% of the N.A.D.A. appraised value or the price that the dealer actually paid for the houses, whichever was less.

She testified as to this transaction, she had a list of mobile homes that were purchased and she determined the N.A.D.A. value on each of them. She then figured 60% of that valuation. The value of the mobile homes was in excess of $93,176.00. Therefore,

according to policy, the institution should have floorplanned the homes to Defendant Cox for $93,176.00, which was the cost of the homes.

However, the homes were floorplanned at 60% of N.A.D.A. 60% of N.A.D.A. was apparently $122,899.00. H.S.A. wired Starks Brothers $93,176.00. H.S.A. then sent Cox a check for $29,723.53. This was the amount of the N.A.D.A. valuation minus the cost of the mobile homes and incidentals.

Billy Cox was also charged in Count 16 with a violation of 18 U.S.C. § 1344(1) in relation to a transaction involving a man named Glenn Whitecotton in Roswell. Cox was acquitted of Count 16.

REASONS FOR GRANTING THE WRIT AS TO QUESTION ONE

Review on a writ of certiorari should be granted pursuant to Rule 10(a) of the Supreme Court Rules.

United States Sentencing Guideline § 2F1.1 provides that the actual loss to the victim is to be used in calculating the increase in offense levels in fraud cases. However, Application Note 7 provides that "if an intended loss that the defendant was attempting to inflict" can be determined, that figure is to be used if it is greater than the actual loss.

The Court of Appeals for the 5th Circuit held that the proper interpretation of the U.S. Sentencing Guidelines for calculation of loss in cases such as this, is the loss intended by the actor rather than actual loss to the institution, and that the phrase "intended loss" means indifference or recklessness as to whether the loan would be repaid. This holding is in conflict with the interpretation of the 3rd, 8th and 10th Circuit Courts of Appeals.

In the case at bar, the evidence showed that numerous loan applications were falsified. Often, the loans were paid off. Often, the loans went into default and there were repossessions.

The 5th Circuit approved a calculation using the total amount of falsified loans, without giving any credit for the loans which were repaid or the amount recovered through default proceedings. The 5th Circuit held that the Petitioner was "consciously indifferent or reckless" about repayment and equated that mental state with "intended loss", therefore approving the use of all loans in calculating "loss" whether or not the loan was repaid or foreclosed. The Court therefore approved an increase in the offense level by 14 levels, attributing almost 9 million dollars in losses to the Petitioner without showing the actual loss or actual intent. In contrast, restitution of $600,000 was ordered.

In ***United States v. Kopp***, 951 F.2d 521 (3rd Cir. 1991) the defendant submitted fraudulent financial information to a lender to obtain a $14,000,000.00 loan. The court rejected that the entire loan amount should be calculated as the loss under U.S.S.G. § 2F1.1. The Court analyzed the difference between a theft loss and a fraud loss such as that resulting from that defendant's bank loan fraud. With the theft, the perpetrator intends the loss of the full amount. In fraud, the

actor may not have intended the institution to suffer the consequences.

It would be an extraordinarily harsh result to make a criminal defendant liable for the entirety of the loans if there is a misstatement. Under that scenario, a commercial broker who falsifies a loan application for an $80,000,000.00 loan and has a buyer who pays back the entirety of the loan, could still see an increase in 18 levels in his punishment, even though there has been no actual harm to the bank and none was intended. It would still be a crime, but to punish so severely absent actual harm or an actual intent to harm would be unjust and is certainly not the plain words of the Sentencing Guidelines.

This court should interpret § 2F1.1, commentary note (b) to mean what it says. Actual loss should be used unless the intended loss is greater. If a defendant had the actual intent to cause a greater loss, he should be punished for that intent. If he is stopped before the plan reaches fruition, he should not be given the benefit of his ineptitude. But where there is no actual intent, the actual loss should be required to be used.

Use of intent to mean recklessness is a slippery slope. It should be remembered that the general rule is actual loss. It is only when the mens rea of the defendant is such that actual loss does not adequately reflect that mindset, that intended loss is to be used. If there is not greater evil intent, actual loss should be used in the calculation. Application Note 7 says that actual loss is to be used unless it is determined the defendant was attempting to inflict a greater loss. Recklessness is not a mindset of attempting to inflict a loss.

The case at bar is extremely similar to ***United States v. Smith***, 951 F.2d 1164 (10th Circ.1991). In ***Smith*** a defendant built and marketed single family residences. ***Smith*** misrepresented to a bank that various customers of his had made down payments on homes when in fact such payments had not been made. The 10th Circuit held that the loss was not to be measured by the cumulative value of the loans, ($440,896.00). There was no evidence in the record for finding that ***Smith*** attempted to inflict a loss of $440,896.00 and the defendant in that case, as here, did receive money but returned to the lender security interest in the homes and the promise of individual

buyers to repay the loan just as in the case at bar. The court held that there was no basis for finding an intended loss and that actual loss should be used.

Recently the 8th Circuit had an occasion to deal with a similar situation. In ***United States v. Wells***, 127 F.3d 739 (8th Cir. 1997), the 8th Circuit dealt with a question of what is meant by intended loss. In that case the government claimed that intended loss as used in § 2F1.1 is measured by the potential loss or possible loss that could arise from the charged crime, not by the amount of loss the defendant intended to cause. The Court noted that under that view, intended loss would be shorthand for "the possible loss that could have resulted regardless of what the defendants intended the loss to be". The Court rejected the government position and held that intended loss means what it says, the amount the defendant actually intended.

The 5th Circuit cited ***United States v. Wimbish***, 980 F.2d 312 (5th Cir. 1992) cert. denied 508 U.S. 919 (1993). The ***Wimbish*** case is directly in conflict with the other Circuit Courts of Appeals. Note 7(b) of § 2F1.1 states.

"In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any asset pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used."

The 5th Circuit declined to discuss this note in the case at bar.

The 7th Circuit has apparently agreed with the 5th Circuit in its calculations. See ***U.S. v. Lauer***, 148 F.3d 766 (7th Cir. 1998).

The 5th Circuit is mistaken in equating intended loss with recklessness or conscious indifference. This Court should resolve this conflict between the circuits and grant the writ.

REASONS FOR GRANTING THE WRIT AS TO QUESTION TWO

Review on a writ of certiorari should be granted pursuant to Rule 10(c) of the Supreme Court Rules. This Court has never addressed the question of whether 18 U.S.C. § 1344 (2) requires an overt misstatement. The 5th Circuit stated that while there was absolutely no evidence of an overt misrepresentation of funds, the court held that "a reasonable member of the jury could concluded that Max Cain engaged in fraud in approving the loan at the higher NADA amount in violation of bank policy; that he made a fraudulent representation to obtain funds from the bank". There was no evidence of any type of misrepresentation. The issue that this Court should decide is whether there must be an overt misrepresentation before there can be a violation of 18 U.S.C. § 1344(2).

In ***United States v. Briggs***, 939 F.2d 222 (5th Cir. 1991) cert. denied 506 U.S. 1067 (1993) the court dealt with the requirements of 18 U.S.C. § 1344(2) and discussed the meaning of "by means of false or fraudulent pretenses, representations or promises". The court concluded that the defendant in that case made no explicit false representation, statements or promise. The court rejected the

government argument that the act of instructing a bank to transfer funds is a false representation of one's authority to order the transfer, citing ***United States v.Medeles***, 916 F.2d 195 (5th Cir. 1990). The court held in ***Briggs*** that there had to be misrepresentation that is false before 18 U.S.C. § 1344(2) is violated. The ***Briggs*** court similarly cited ***Williams v. United States***, 458 U.S. 279 (1982). See also ***United States v. Heath***, 970 F.2d 1397 (5th Cir. 1992) cert. denied 507 U.S. 1004 (1993).

In a later incarnation of ***United States v. Briggs***, 965 F.2d 10 (5th Cir. 1992) the court continued to hold that there had to be a misrepresentation. The court in ***Briggs*** indicated that the defendant falsely held out herself to have authority which she did not have. That conduct constituted a false statement.

If the government had proved what it alleged in the indictment, a violation of 18 U.S.C. § 1344(2) would have been proved. The allegation in Count 15 was that Cox purchased 16 mobile homes from Starks Brothers for $93,000.00 which was paid in full at the time of the purchase. The indictment further alleged that Cox and Cain represented (falsely) to Banc Home that the cost of the

mobile homes was $122,000.00. The indictment further alleged that the bank then paid Cox and Cain the additional $29,000.00 which they pocketed. If the government had proved this, a violation of § 1344(2) would have been shown, as a misrepresentation would have occurred.

However, this is not what the proof at trial showed. Kenneth Starks testified that he owned Starks Mobile Home Sales and that he sold homes in bulk to the A-1 lots owned by Defendant Billy Cox. He sold 16 homes to Cox for a total of $93,176.00. These were all preowned homes, some in good condition and some in bad condition. He was wired $93,176.00 by H.S.A.

Shirley Henderson testified that she worked at H.S.A. during this time and worked for Max Cain. She stated that Cain was in a hurry to get the Starks transaction floorplanned. She testified that bank policy allowed H.S.A. to floor plan or finance a dealer's purchase of used mobile homes at 60% of the N.A.D.A. appraised value or the price that the dealer actually paid for the houses, whichever was less. She testified that as to this transaction she had a list of the mobile homes that were being purchased and she

determined the N.A.D.A. value on each of them. She then figured 60% of that valuation. 60% of the value of the mobile homes was in excess of $93,176.00. Therefore, according to policy, the institution should have floorplanned the homes to Cox for $93,176.00, which was the cost of the homes.

However, the houses were floorplanned at 60% of N.A.D.A. 60% of N.A.D.A. was apparently $122,899.00. The bank wired Starks Brothers $93,176.00. The bank then sent Defendant Cox $29,723.53. This was the amount of the N.A.D.A. valuation minus the cost of the mobile homes and incidentals. In other words, at most, Cain violated bank lending policy by funding the houses at 60% of N.A.D.A. value.

This may very well have been a violation of § 1344(1) as a scheme or artifice to defraud a financial institution. It most certainly was a misapplication by a bank officer in violation of 18 U.S.C. § 656. But it was not a violation of the charged statute 18 U.S.C. § 1344(2). There was no materially false statement in connection with the Starks Brothers transaction. The statute is clear and

unambiguous. Before there can be a violation of 18 U.S.C. § 1344(2) there must be a false statement and that must be adequately proved.

CONCLUSION

For the foregoing reasons, Petitioner, BILLY WAYNE COX, asks that his Petition for Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JIM W. JAMES, do certify that on this the ____ day of August, 1999, a true and correct copy of the above and foregoing Petition For Writ of Certiorari was forwarded by United States Mail, First Class mailing, postage prepaid, to:

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JIM W. JAMES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-50958

UNITED STATES OF AMERICA Plaintiff-Appellee,

versus

TAMMY DENISE MORROW;
LARRY WAYNE MEINZER;
ALICE MARIE BARBER, also known as
Alice Marie Turner, also known as
Alice Marie Rogers; SAMANTHA
GRAHAM DAVIS, also known as
Sammie Davis, also known as Samantha L.
Davis, also known as Sammie L. Davis;
ARNOLD GENE TROUT, also known
as Gene Trout; MASON LONG; DARRELL
PAUL FREEMAN, also known as Paul
Freeman; JAMES MICHAEL CALDWELL,
also known as Mike Caldwell; PATRICK
GENE MALMSTROM, also known as Rick
Malmstrom; BILLY WAYNE COX, JR.,
also known as Billy Cox; MAX WAYLAN
CAIN, SR. Defendants-Appellants

Appeals from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, JONES, and WEINER, Circuit Judges.

PER CURIAM:

Eleven defendants appeal convictions of conspiring and aiding and abetting bank fraud in the financing of A-1 mobile homes. The

central purpose of the scheme was to obtain bank financing for customers who had not made adequate cost down payments. We affirm all the judgments of conviction but vacate the sentence of eight defendants and remand for resentencing.

I

Count 1 of the indictment charged that from about November 3, 1986 until about February 1, 1990 the defendants conspired to commit bank fraud in violation of 18 U.S.C. §§ 371 and 1344(2). The indictment listed 43 overt acts relating to various mobile home sales transactions by the defendants. These overt acts were also alleged under Counts 2 through 13 in the indictment as substantive counts of bank fraud against each of the defendants. Count 14 alleged that Mason Long committed bank fraud in an effort to obtain financing for the purchase of mobile homes, in violation of 18 U.S.C. §§ 371 and 1344(2). Count 15 alleged that Mason Long, Billy Cox, and Max Cain participated in the financing bank fraud scheme in violation of 18 U.S.C. §§ 371 and 1344(2). Count 16 alleged that Billy Cox and Max Cain defrauded a bank of $15,000 to start a

company called "Slow and Easy," in violation of 18 U.S.C. §§ 371 and 1344(1).

The defendants were tried together and all were convicted of one or more counts. We summarize the convictions:

Alice Barber, an A-1 sales representative and manager in Bryan, Texas, was convicted of conspiracy to commit bank fraud (Count 1) and aiding and abetting bank fraud (Count 4).

Max Cain, the vice-president of Home Savings, Banc Home, and HSA Mortgage Company, was convicted of bank fraud (Count 1) and two counts of bank fraud and aiding and abetting bank fraud (Counts 2 and 15).

James Caldwell, an A-1 sales representative in Nacogdoches, Texas, was convicted of conspiracy to commit bank fraud (Count 1) and aiding and abetting bank fraud (Count 10).

Billy Cox, owner of A-1 mobile home franchises, was convicted of bank fraud (Count 1) and two counts of bank fraud and aiding and abetting bank fraud (Counts 3 and 15).

Sammy Davis, an A-1 sales representative in Bryan, Texas, was convicted of aiding and abetting bank fraud (Count 7).

David Freeman, an A-1 sales representative in Bryan, Texas, was convicted of conspiracy to commit bank fraud (Count 1) and aiding and abetting bank fraud (Count 8).

Mason Long, partner to Billy Cox, was convicted of bank fraud (Count 1) and two counts of bank fraud and aiding and abetting bank fraud (Counts 14 and 15).

Pat Malmstrom, an A-1 sales representative in Waco, Texas, was convicted of conspiracy to commit bank fraud (Count 1) and aiding and abetting bank fraud (Count 12).

Tammy Morrow, an A-1 sales representative in Nacogdoches, Texas, was convicted of aiding and abetting bank fraud (Count 11).

Larry Meinzer, an A-1 sales representative in Waco, Texas, was convicted of aiding and abetting bank fraud (Count 13).

Gene Trout, an A-1 sales representative in Bryan, Texas, was convicted of conspiracy to commit bank fraud (Count 1) and aiding and abetting bank fraud (Count 9).

II

Bank fraud under 18 U.S.C. § 1344 requires proof beyond a reasonable doubt that the defendants knowingly executed or attempted to execute "a scheme or artifice - (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." To establish a conspiracy violation under 18 U.S.C. § 371, the Government had to prove beyond a reasonable doubt: "(1) an agreement between two or more people, (2) to commit a crime against the United States, and (3) an overt act by one of the conspirators to further the objectives of the conspiracy."

United States v. Dupre, 117 F.3d 810, 820 (5th Cir. 1997) (holding evidence of cooperative effort sufficient to support convictions for conspiracy to commit bank fraud), cert. denied, --- U.S. ---, 118 S.Ct. 857 (1998). A defendant may be convicted for aiding and abetting the commission of a crime if he was " 'associated with a criminal venture, participated in the venture, and sought by his action to make the venture succeed.'" United States v. Parekh, 926 F.2d 402, 406 (5th Cir. 1991) (quoting United States v. Holcomb, 797 F.2d 1320, 1328 (5th Cir. 1986)).

III

The Government urges that it proved that Cox, Long, and Cain directed a "far reaching scheme to fraudulently obtain the funds of the Bank." Billy Cox directed the activities at the various A-1 lots, and Max Cain worked to keep the fraudulent loan practices hidden. Mason Long delivered the mobile homes and instructed customers not to tell the bank that their reported down payments had been inflated. The other defendants, managers and sales representatives from different lots, collected information from customers with the

knowledge that the information would be used to prepare fraudulent loan packages for the sale of mobile homes.

Defendants Max Cain, James Caldwell, Samantha Davis, David Freeman, Mason Long, Pat Malmstrom, Tammy Morrow, Larry Meinzer, and Gene Trout argue insufficiency of the evidence. We apply the familiar standard, asking whether a "reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993).

1

Max Cain argues that there is insufficient evidence to support his conviction of Count 2; that while he may have violated 18 U.S.C. § 656 (theft, embezzlement, or misapplication by a bank officer) by selling mobile homes out of trust (pocketing the loan repayment), there was no evidence that he defrauded the bank or misrepresented any facts to it. Cain also argues that the evidence was insufficient to support his conviction to aid and abet bank fraud in Counts 2 and 15 because the Government did not prove that he shared any criminal intent with Richard White or Billy Cox, purchasers of trailers.

The Government produced evidence showing that Cain actively and knowingly participated in the scheme to defraud the bank by hiding A-1's fraudulent practices. It urges that Max Cain instructed Richard White to falsely complete various financing forms used in sales of mobile homes. The evidence also showed that Cox, Cain, and Long worked together to obtain money to purchase a set of mobile homes under a floor plan. The request for funds exceeded the actual cost of the homes. The three split the excess money. Viewing this evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that Max Cain conspired and aided and abetted the commission of such fraud.

James Caldwell was a sales representative in Nacogdoches from February 4, 1988 until September 1, 1988. He argues that the evidence against him was insufficient to support his convictions; that the Government failed to prove a single conspiracy as alleged in the indictment, or that he joined any conspiracy.

The Government presented evidence showing that Caldwell participated in the preparation of false down payments and credit applications. For instance, Tim Howard, the sales manager at the lot

at which Caldwell worked, testified that Caldwell reported document falsification to him pertaining to sales Caldwell made because Howard would handle any calls from the bank regarding the applications. Janna Kimbrough also testified that Caldwell participated in the scheme to defraud the bank. Viewing this evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that James Caldwell conspired and aided and abetted the commission of fraud.

Billy Cox contends that the evidence was insufficient to prove a violation of 18 U.S.C. § 1344(2) in Count 15 pertaining to 16 mobile homes purchased from the Stark Brothers under a bank floor plan, a plan for financing of mobile homes. Cox argues that this court has held that § 1334(2) requires "a material misrepresentation to the bank." United States v. Campbell, 64 F.3d 967, 975 (5th Cir. 1995). He asserts there were no misrepresentations. He admits funds may have been misapplied contrary to 18 U.S.C. § 656, or that there was evidence of a scheme to defraud a financial institution, prohibited by § 1334(1).

The Government accepts Cox's legal reasoning regarding any variance between the indictment and the proof at trial. The indictment alleges that Cox, Cain, and Long lied about the actual cost of the floor plan in order to split the excess loan proceeds. The Government's evidence, however, did not demonstrate that these defendants lied about the cost of the 16 mobile homes purchased from Stark Brothers. It does show that the bank loaned $122,899, which was 60% of the wholesale value, otherwise known as N.A.D.A. cost of the homes, and not $93,176, the dealer cost amount. Bank policy required loans be made at the lower of these two amounts.

Specifically, Kenneth Starks of Starks Brothers testified that he sold 16 mobile homes to A-1 for $93,176, the dealer cost. The testimony of Shirley Henderson also indicates that the cost of these homes was $93,176 and that 60% of the N.A.D.A. wholesale price (approx. $205,000) was $122,899. Henderson explained that it was the bank's policy in a floor plan transaction to calculate 60% of the N.A.D.A. cost and compare that to the dealer cost. According to the bank policy, these homes should have been floor planned at $93,176, not at $122,899, the higher 60% N.A.D.A. value. Once Starks was

paid the $93,176, the remaining $29,722 was sent to A-1 Mobile Homes and allegedly split between Max Cain, Billy Cox, and Mason Long.

We conclude that a reasonable member of the jury could conclude that Max Cain engaged in fraud in approving the loan at the higher N.A.D.A. amount in violation of bank policy; that he made a fraudulent representation to obtain funds from the bank. See United States v. Briggs, 965 F.2d 10, 11 (5th Cir. 1992) (holding that despite no evidence of overt misrepresentations, false promises, or false statements to a financial institution, the defendant's implicit misrepresentation that she had authority to transfer money was sufficient to establish misrepresentation element of § 1344(2)). The evidence was sufficient to support the convictions of Max Cain, Billy Cox, and Mason Long of bank fraud under § 1344(2), as alleged in Count 15 of the indictment.

Samantha Davis worked for about four weeks as an A-1 sales representative at the Bryan, Texas lot. The jury found her guilty of aiding and abetting bank fraud, Count 7 of the indictment. While she concedes that a reasonable juror could find a scheme to commit bank

fraud, Davis denies that there is sufficient evidence of her knowing and intentional participation. She denies falsifying documents, urging that she was too new and in too low a position in the A-1 hierarchy to direct others to falsify documents.

Tim Howard, a Government witness, testified that he discussed the short down payment scheme with Sammie Davis and that she expressed concern about "getting in trouble" after reading an article about mobile home salesmen who were arrested in Florida for making short down payments. Howard also testified that Davis had previous experience with short down payments from a former job at another mobile home company. The evidence was also that Alice Barber, the manager at the Bryan lot, instructed Davis on how to place false information in the loan documents. Viewing this evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that Sammie Davis aided and abetted commission of such fraud.

David Freeman argues that there is insufficient evidence to support his convictions for conspiracy to commit bank fraud and aiding and abetting bank fraud because the Government witnesses

called to testify against him could not identify him as the salesman involved in their falsified mobile home purchase transactions. He asserts that the Government failed to show that he caused any false documents to be submitted to the bank or that he even know such things were happening at A-1.

The Government replies that Freeman's name was listed on the false documents as a participant. A handwriting expert testified that Freeman prepared the falsified documents in sales to A-1 customers Kearney, Gurka, and Nix. The evidence also showed that salesmen, including David Freeman, openly discussed the inflated down payment scheme. This was sufficient.

Mason Long moved for a judgment of acquittal on Counts 1, 14,and 15, arguing that the evidence was insufficient to support his convictions. He urges that no evidence linked him to the falsification of customers' loan information. Long's job was to deliver and set up A-1 mobile homes. He argues that the government's evidence was only that he must have known about the fraud because he was around the office; that he once told another employee, who took drugs, that customers must be reminded that if asked, they are to deny any

inflated down payment. Specifically, Long challenges his conviction on Count 14, charging falsifying information to secure a floor plan loan. In addition, Long claims the Government provided no evidence that he knew about or participated in the Starks Brothers transactions with Cox and Cain or that he knowingly submitted any false statements.

The Government asserts that Long's overt actions showed that he knowingly participated in the scheme and that he promoted the falsification of documents to obtain loan funds. The Government presented direct evidence that Long instructed customers not to reveal the inflated down payment information if bank investigators called them. The Government offered financial statements prepared by Long to be submitted to the bank for the purpose of obtaining floor planning finance for A-1. These statements contained large discrepancies between listed assets' declared values and the actual value of the properties. The evidence also demonstrated that Long conspired with Max Cain and Billy Cox and split the proceeds of the excess loan in the Stark Brothers' mobile homes transaction. Viewing this evidence in the light most favorable to the Government,

a rational jury could conclude beyond a reasonable doubt that Mason Long conspired and aided and abetted the commission of such fraud.

Pat Malmstrom argues the evidence was insufficient to support his convictions for conspiracy to commit bank fraud and aiding and abetting bank fraud. He argues that the Government attempted to make his conduct appear deceptive, but that there was no falsification or wrongdoing involved.

The Government maintains that Malmstrom knew about the fraudulent activities and participated in the scheme to prepare false documents. The evidence showed Malmstrom discussed the practice of falsely stating down payments with his manager and another salesman. There was also evidence that he prepared false documents about customers' down payments or income information. Viewing this evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that Pat Malmstrom conspired and aided and abetted the commission of such fraud.

Larry Meinzer argues the evidence was insufficient to support his conviction for aiding and abetting. While Meinzer does not dispute that the loan packages connected to the sales he made

contained false documents, Meinzer argues that the evidence did not show that he was personally involved in the falsified sales. The Government argues that the evidence supported the jury's inference that Meinzer knew the information he submitted would be falsified considering the overall fraudulent practices at A-1. The evidence also showed that Meinzer was involved in preparing false documents. His argument that the bank was never induced to extend funds on the basis of the documents he prepared, some of which contained false information, does not vitiate the proof that he purposefully participated in a criminal venture to obtain funds falsely. Viewing this evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that Larry Meinzer aided and abetted the commission of bank fraud.

Tammy Morrow argues the evidence was insufficient to support her conviction for aiding and abetting. She argues that her acquittal of conspiracy should show that the evidence did not support a conclusion of aiding and abetting. She asserts there is no evidence that she acted in any affirmative manner to aid the venture. The Government contends that the jury could infer that she knowingly and

voluntarily participated in the scheme to defraud the bank by submitting loan information that she was aware would be fraudulently altered. The testimony of the Government's witnesses against Morrow demonstrated that Morrow knew of the short down payment practice, and that she told her customers to lie to the bank about the down payment if contacted by the bank. This was enough.

Gene Trout maintains that there was no evidence to show his intent to defraud the banks or to participate in a conspiracy to do so; that the Government's witness, Janet Dees, testified that she had no knowledge of whether Trout was ever told about the short down payment technique. Trout argues that he was so ignorant of what was happening that A-1 cheated him on his commissions. According to Trout, because the other Government witnesses never testified directly that Trout prepared or talked about falsified documents, or that he knew about the practice of falsifying documents, the evidence did not prove beyond a reasonable doubt that he committed or aided and abetted bank fraud or conspiracy to commit it.

The Government maintains that the evidence showed that false documents were submitted in connection with Trout's sale of

three mobile homes. Although Trout was "in and out" of the office during the closing transactions, the jury could infer that he had full knowledge that the packages would be submitted to the bank with fraudulent information. Also, there was testimony by one of Trout's customers that Trout told her about the inflated down payment practice and directed her to submit a falsified gift letter to secure the financing on their mobile home purchase. This was enough.

IV

I

Defendants Barber, Cain, Cox, Davis, Freeman, Long, Malmstrom, Meinzer, and Morrow argue that they were improperly joined in the indictment and that the trial court abused its discretion by denying their motions for severance. Proper joinder requires that the offenses charged "must be shown to be part of a single plan or scheme," and that "[p]roof of such a common scheme is typically supplied by an overarching conspiracy from which stems each of the substantive counts." United States v. Faulkner, 17 F.3d 745, 758 (5th Cir. 1994) (quoting United States v. Lane, 735 F.2d 799, 805 (5th Cir. 1984), rev'd in part on other grounds, 474 U.S. 438 (1986)). Each of

the counts charged in the indictment here stems from a common conspiracy to defraud the Home Savings Association and related bank institutions. Joinder in a single indictment was proper.

Federal Rule of Criminal Procedure 14 provides that a court may order a severance "[i]f it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together." Assuming joinder is proper under Rule 8, denial of a motion for severance is reviewable only for an abuse of discretion. See United States v. Bullock, 71 F.3d 171, 174 (5th Cir. 1995). To demonstrate an abuse of discretion, the defendant " 'bears the burden of showing specific and compelling prejudice that resulted in an unfair trial,'" and such prejudice must be of a type " 'against which the trial court was unable to afford protection.'" Faulkner, 17 F.3d at 759 (quoting United States v. Pofahl, 990 F.2d 1456, 1483 (5th Cir. 1993)).

The defendants' large broadside is a claim of guilt by association – prejudice from a large volume of evidence admitted without limiting instructions to insulate them from spillover prejudice. The trial was lengthy, but nothing suggests that the jury

was unable to follow the evidence, distinguish the various charges, and independently assess each defendant. As much as we know points in the opposite direction. The jury acquitted Davis, Morrow, and Meinzer of conspiracy to commit bank fraud, and Cox and Cain of bank fraud under Count 16. This suggests that the jury considered separately the evidence as to each defendant and each count. Further, the court instructed the jury that "[t]he fact that these defendants are tried together is not and should not be considered by you as evidence of the guilt of them or any of them." The district court also instructed the jury not to consider the fact that the defendants may have presented evidence, objected, or cross-examined witnesses together. The district court instructed the jury that evidence of similar acts by defendants Billy Cox and Mason Long committed on other occasions should not be considered as to the other defendants; that evidence that related to Counts 14, 15, and 16 was to be considered only as to those counts; and that no defendant was on trial for any other act not alleged in the indictment. Similar instructions have been held sufficient to cure prejudice, and juries are presumed to follow their

instructions. See Zafiro v. United States, 506 U.S. 534, 540-41 (1993).

2

The defendants also argue that the district court abused its discretion by refusing to sever because Cox admitted the fact of the scheme but contended that the bank was aware of it – directly at odds with their defense that no scheme was to be proved. The Government sticks with the mantra that the defendants have failed to articulate specific instances of prejudice and argues that they are not entitled to severance merely because they would have had a better chance of acquittal. See id. at 538-39. We have held that "instructions to consider the evidence as to each defendant separately and individually and not to consider comments made by counsel as substantive evidence sufficed 'to cure any prejudice caused when co-defendants accuse each other of the crime.'" United States v. Mann, 161 F.3d 840, 863 (5th Cir. 1998) (quoting United States v. Stouffer, 986 F.2d 916, 924 (5th Cir. 1993)). The district court gave appropriate instructions. There is then the matter of the individual defendant's arguments that they ought to have had separate trials.

3

We find Larry Meinzer and Caldwell waived their severance arguments because they cannot adopt their co-defendants' arguments without specifically showing how they were prejudiced. Their contentions would equally fail for want of a showing of specific prejudice. That is, they waived their contentions, but they were plainly without merit, so they lost nothing for any inactions or improper acts of their counsel.

4

Alice Barber, Pat Malmstrom, and Mason Long argue that their cases should not have been joined; that there was a fatal variance between the indictment, with its single conspiracy, and the proof at trial of multiple and independent conspiracies. To prevail on a material variance claim, these defendants must prove (1) a variance between the indictment and the proof at trial, and (2) that the variance affected their substantial rights. See United States v. Morgan, 117 F.3d 849, 858 (5th Cir.), cert. denied, 118 S.Ct. 454 (1997). Whether the evidence shows one or multiple conspiracies is a question of fact for the jury. See id. The principal considerations in counting the

number of conspiracies are (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings. See id. We will "affirm the jury's finding that the Government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the Government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." Id.

The "common goal" factor used to count conspiracies has been defined broadly by this court. See United States v. Morris, 46 F.3d 410, 415 (5th Cir. 1995) (holding that the common goal of deriving personal gain from the illicit business of buying and selling cocaine constituted a single conspiracy). The jury could reasonably have concluded that the common goal of the charged conspiracy in this case was to derive personal gain from the sale of mobile homes through the submission of false loan information.

The nature of the scheme and the overlap of participants also support a single conspiracy. There was evidence that Billy Cox, Max Cain, and Mason Long were "key men" who orchestrated the practice of short down payments and falsifying customer information to obtain

loan funds for the sale of A-1 mobile homes. The managers and the salesmen at each A-1 lot were the cogs necessary to spin this wheel. Viewed in the light most favorable to the verdict, the efforts of all the defendants convicted of conspiracy were necessary to the overall success of the criminal venture.

Even if we were to conclude that there was a variance, we find that Alice Barber, Pat Malmstrom, and Mason Long have failed to show how the alleged variance affected their substantial rights. We find that the evidence is sufficient to prove each convicted defendant's participation in at least one conspiracy, and none has shown reversible error under joinder and severance principles. "[W]hen the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." United States v. Davis, 132 F.3d 1092, 1095 (5th Cir. 1998) (citing Faulkner, 17 F.3d at 762). Finally, as a safeguard against prejudice, the jurors were cautioned in the instructions from finding guilt if the proof

presented by the Government established any conspiracy other than that charged in the indictment.

5

Tammy Morrow contends that she was prejudiced by the district court's refusal to sever her case because James Caldwell would then have testified that neither of them knew of any false documentation scheme for financing A-1 mobile homes. The Government replies that she did not provide the trial court with any substantive information about Caldwell's potential testimony. The Government also argues that the trial court did not abuse its discretion by refusing to accept Morrow's attempt at the close of trial to use Caldwell's affidavit. The affidavit stated that Caldwell and Morrow were unaware of any false documentation scheme at A-1 mobile homes. We find no abuse of discretion by the district court in denying Morrow's motion to sever.

6

Billy Cox argues that the district court abused its discretion by denying his motion to sever because the Government presented evidence of witness Robert Harvey's guilty plea. As Cox concedes,

this issue has been foreclosed by this court's opinion in United States v. Manges, 110 F.3d 1162, 1176 (5th Cir. 1997), which held that the district court did not abuse its discretion by admitting evidence of a co-defendant's guilty plea which related solely to the co-defendant's credibility. Moreover, the district court instructed the jury that the "fact that an accomplice has entered a plea of guilty to the offense charged is not evidence in and of itself of the guilt of any other person." Id. We find no abuse of discretion by the district court in denying Cox's motion to sever.

V

Defendants Barber, Cain, Caldwell, Cox, Davis, Long, and Malmstrom challenges the district court's refusal to include their proffered jury instructions. We review the refusal to provide a requested instruction for abuse of discretion. See United States v. Asibor, 109 F.3d 1023, 1034 (5th Cir.), cert. denied, 118 S.Ct. 254 (1997). District courts enjoy substantial latitude in formulating jury instructions. We reverse only if the requested jury instruction "(1) was a substantially correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an

important point in the trial, the omission of which seriously impaired the defendant's ability to present an effective defense." Id.

1

Defendants Barber, Cox, and Long contend that the district court should have given their requested jury instruction regarding their "good faith" defense. The Government argues that the district court did not abuse its discretion because it allowed the defendants to argue good faith to the jury and substantially covered the defense of good faith in the instruction on requisite knowledge. Defendants, however, maintain that the trial court's instruction that the knowledge and complicity of bank officers is not a defense to the charge of bank fraud undermined their contentions of good faith.

We ware persuaded that the jury charge covered the good faith defense. The district court instructed the jury that "the requisite intent to defraud is the defendant acted knowingly and with specific intent to deceive ordinarily for the purpose of causing financial loss to another or bringing about some financial gain to himself." The district court defined the term "knowingly" as an "act [] done voluntarily and intentionally and not because of mistake or accident."

The district court added that "the purpose of adding the word 'knowingly' is to ensure that no one will be convicted of an act done because of mistake, or accident, or other innocent reason." While the district court did instruct that "[k]nowledge or complicity of bank officers, even all bank officers, is not a defense to a charge of bank fraud," the court explained:

> Still, knowledge or complicity of the officers and board of directors of a financial institution may be considered by the jury along with other factors as a part of a defendant's defense that he or she had no intent to defraud a financial institution. Some defendants in this case have raised such a defense. Some defendants have not. You must consider each defendant separately and individual.

2

James Caldwell and Billy Cox argue that 18 U.S.C. § 1014 (knowingly making false statements to a federally insured lending institution) is a lesser included offense of 18 U.S.C. § 1344 (bank fraud) and that the jury should have been instructed accordingly. The Government argues that because this court has determined that § 1014 and § 1344 each require proof of an additional fact, see Dupre, 117 F.3d at 818, § 1014 is not a lesser included offense. We agree. See also United States v. Fraza, 106 F.3d 1050, 1053 (1st Cir. 1997)

(recognizing that "on the plain language of these statutes, the requirements of Blockburger are satisfied"); United States v. Wolfwinkel, 44 F.3d 782, 785 (9th Cir. 1995) (concluding that bank fraud and misapplication of bank funds do not constitute the same offense). There was no error.

3

Billy Cox argues that the district court abused its discretion by refusing to instruct the jury that a mere violation of bank policy was insufficient to convict him of bank fraud as alleged in Count 15. The Government argues that the district court's charge substantially covered the requested instruction.

The charge directed the jury that it must find all the elements of bank fraud. The proffered instruction was substantially covered by the trial court's charge.

4

Pat Malmstrom and Samantha Davis requested that the jury be instructed that it must unanimously find beyond a reasonable doubt that the defendants submitted false or fraudulent documentation in connection with all the loan transactions referred to in each count in

order to convict the defendant of that count. The district court's instruction required that the jury unanimously find that the defendant committed at least one and the same materially false or fraudulent pretense or representation. The charge explained that "all of you must agree unanimously that the same false of fraudulent pretense, representation, or promise alleged in a particular count was in fact employed by the particular defendant charged in that count." We find that the district court's instruction was proper because each respective count alleged only one offense under § 1344(2). This was not a situation where a jury could find a defendant guilty on a single count under multiple theories of liability; rather, each respective count alleged only one offense under 18 U.S.C. § 1344(2). We find no abuse of discretion by the district court.

5

Pat Malmstrom argues that the district court erred by giving a Pinkerton instruction. According to Malmstrom, "[t]he evidence did not support the giving of the Pinkerton charge because of the scope of the alleged agreement in this case." The district court instructed the jury in accordance with § 2.22 of this circuit's Pattern Criminal Jury

Instructions, Conspirator's Liability for Substantive Count. Furthermore, we find the district court properly instructed the jury that someone who jointly undertakes a criminal activity with others is accountable for their reasonably foreseeable conduct in furtherance of the joint undertaking.

VI

Defendants Billy Cox, Pat Malmstrom, and Gene Trout assert that the district court committed clear error by upholding the Government's peremptory challenge of juror Joyce Jean Jones, a black woman. The Government explained that it struck Jones because she had indicated on a questionnaire reviewed before voir dire that she never read magazines, books other than the Bible, and did not watch television. The Government explained that it rated Jones low before it knew she was black. The district court accepted the Government's answer as race-neutral stating that it was "legitimately appropriate and in good faith." We give deference to a district court's finding and evaluation of credibility of the Government's offered reasons for striking a juror. See Hernandez v. New York, 500 U.S. 352, 364 (1991).

The defendants argue that the Government's proffered reasons for striking Jones were pretextual given that other jurors who preferred religious information were not struck. In addition, Cox argues that the alleged neutral explanation offered here does not relate to the case. See Batson v. Kentucky, 476 U.S. 79, 98 (1986) (requiring that the prosecutor articulate a neutral explanation related to the particular case to be tried). Cox also contends that a Batson challenge cannot be satisfied by a prosecutor's denial of discriminatory intention or affirmation of good faith. See Purkett v. Elem, 514 U.S. 765, 840 (1995). The contentions are without merit. We find no clear error.

VII

Tammy Morrow argues that the district court erred by denying her motion to dismiss the indictment because the prosecution for bank fraud was barred by the statute of limitations. She contends that, at the time of her indictment, 18 U.S.C. § 3282's five-year statute of limitations period applied and had expired; that 18 U.S.C. § 3293, enacted August 9, 1989 and providing a ten-year statute of limitations

for prosecutions of violations of § 1344, cannot be applied under the Ex Post Facto Clause.

Congress provided that "the amendments made to this subsection (§3293) shall apply to an offense committed before the effective date of this section [August 9, 1989], if the statute of limitations applicable to that offense under this chapter had not run as of such date." 18 U.S.C. § 3292 (noting § 961(1)(3) of Pub. L. No. 101-73). On August 9, 1989, when § 3293 was enacted, the initial five-year statute of limitations provided by § 3282 had not run. The ten-year statute of limitations was properly applied.

We have held that the Ex Post Facto Clause does not preclude the application of § 3293's ten-year statute of limitations for violations of § 1344 committed before § 3293's enactment and prosecuted before the previously applicable limitations period expired. See United States v. Baker, 61 F.3d 317, 326 (5th Cir. 1995); United States v. Bretchel, 997 F.2d 1108, 1112-13 (5th Cir. 1993). While Morrow concedes that her argument is foreclosed by Bretchel, she contends Bretchel was wrongly decided and that the revised statute of limitations is in fact violative of the Ex Post Facto Clause.

She maintains that the counts in the indictment against her should have been dismissed because she was not indicted within five years of any relevant conduct. We reject Morrow's arguments and find that the district court correctly denied her motion to dismiss on the basis of the statute of limitations.

VIII

Max Cain maintains that the district court erred in admitting the following evidence: (1) business records lacking a proper predicate, (2) statements about "feelings and suspicions" lacking a proper predicate, and (3) statements admitted as co-conspirator statements but not made to further a conspiracy.

Our standards of review is abuse of discretion, and under Fed. R. Evid. 103(a), an erroneous evidentiary ruling is reversible error only if a party's substantial rights are affected. See Carroll v. Morgan, 17 F.3d 787, 790 (5th Cir. 1994).

1

Cain argues that approximately 300 documents from Home Savings were improperly admitted through Wilma York, the records custodian for First American, the successor of First America. Cain

asserts that York admitted that she had no personal knowledge as to how the record-keeping system worked at Home Savings and thus could not meet the requirements of Federal Rule of Evidence 803(6).

Rule 803(6) turns on the reliability or trustworthiness of the records. See United States v. Box, 50 F.3d 345, 356 (5th Cir. 1995). We are persuaded that York's testimony established that the documents had sufficient indicia of reliability. The district court found the records authentic, and York explained how she came to possess them and how they were maintained. We find no reversible error in the admission of these records.

Next, Cain contends that the testimony of Government witness Gwendolyn Williams, who had worked at the Bryan A-1 for two months in 1987, that she was suspicious that "something was wrong" at the A-1 lot was inadmissible. She also testified that after being warned by James Alford about A-1, she left her employment there. Cain argues that Alford was never mentioned as a co-conspirator so anything he said was impermissible hearsay.

Cain did not object to Williams' testimony as improper lay opinion under Federal Rule of Evidence 702. Cain claims that there

was a "running objection to her testimony," but the record is unclear as to the basis of that running objection. Rather, Cain objected on grounds of relevancy and hearsay, objections overruled by the district court. Cain's substantial rights were not affected.

Cain also argues that the district court improperly admitted the testimony of Tim Howard, an A-1 salesman from 1987 until 1990. Howard testified that on one occasion the bank discovered three short down payments in a one week period. Howard also testified that Cain's disapproval of short down payments made during a phone conference with Cox, Howard, and Tim Matthews was "just a show." Cain contends that Howard lacked personal knowledge and that his statements were speculations about A-1 based on a conversation with Cain in which Cain told him "they were not doing these things." The Government argues that Howard's testimony about Cain's telephone conversation being "just a show" was not speculation. It was based on the fact that Billy Cox told Howard that Cain already knew about the short "downs" because Cain was aware of the fraud at A-1. Howard's testimony was admissible. It was based on personal knowledge of events and conversations with co-conspirators.

Cain complains that the statements by Tim Howard and Janna Kimbrough were inadmissible hearsay because they did not fall within the co-conspirators exception of Federal Rule of Evidence 801(d)(2)(E). Cain challenges Howard's testimony concerning a conversation Howard had with Billy Cox in which Cox talked of a customer who had purchased a mobile home but had no heat. Cox allegedly said that Max Cain had gotten all the money. Cain argues that this statement was not made in furtherance of the conspiracy. There was no objection to this testimony. Absent a timely objection, we review for plain error. See Marceaux v. Conoco, 124 F.3d 730, 734 (5th Cir. 1997). Reversal for plain error is appropriate only where the alleged error was obvious, substantial, and, if not corrected, would " 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,'" Id. (quoting Highlands Ins. Co. v. Nat'l Union Fire Ins. Co., 27 F.3d 1027, 1032 (5th Cir. 1994)). The district court's admission of Tim Howard's testimony was not plain error.

Cain protests the admission of Janna Kimbrough's testimony. Before she testified, Cain objected that any statements made by Howard to Kimbrough had nothing to do with Cain and did not

further the conspiracy. The district court overruled this objection. Kimbrough then testified to the following: "Tim told me if he would have a problem on a house that was already delivered and he absolutely could not get a loan officer to approve, then he told me that he would call Bill and Billy would call Max and just go over the loan officer's head." The district court properly admitted this testimony under Federal Rule of Evidence 801(d)(2)(E).

IX

Pat Malmstrom argues the district court abused its discretion by denying his motion to dismiss. He contends that the indictment failed to state an offense, was vague, duplicitous, and that striking language from one of the counts resulted in a constructive amendment.

1

Malmstrom claims that Count 12 failed to allege false representations with sufficient specificity to provide him adequate notice; that the government referred only to general "false information and documents." Pointing to United States v. Lang, 766

F. Supp. 389, 395-96 (D.Md. 1991), he urges that the indictment must identify some of the alleged false statements.

The Government responds that the charged crimes were clear. The Government asserts that Lang, which dealt with a violation of 18 U.S.C. § 1001 (making a false statement), is inapplicable because the court held failure to set forth the false entries with particularity did not require dismissal of the indictment. In addition, the Government claims that Malmstrom cites no authority for his contention that counts of an indictment for conspiracy and bank fraud must specify each false document and what portion is false.

We review the sufficiency of an indictment de novo. See Asibor, 109 F.3d at 1037. The purpose of the indictment is "to allege each essential element of the offense charged so as to enable the accused to prepare his defense and to allow the accused to invoke the double jeopardy clause in any subsequent proceeding." United States v. Cluck, 143 F.3d 174, 178 (5th Cir. 1998), cert. denied, 119 S.Ct. 808 (1999) (quoting United States v. Webb, 747 F.2d 278, 284 (5th Cir. 1984). The proper test for determining the validity of the indictment is whether the defendant has been prejudiced by the

alleged deficiency. See United States v. Crow, 164 F.3d 229, 234 (5th Cir. 1999).

The indictment cites § 1344(2) and tracks the statutory language for bank fraud. It outlines the facts of the offense by describing the kind of false information submitted, the approximate date, and the A-1 customer involved. We find that the indictment was not vague and provided adequate notice to Malmstrom of the charges against him.

2

Malmstrom argues that the indictment was duplicitous. " 'Duplicity' is the joining in a single count of two or more distinct and separate offenses." United States v. Elam, 678 F.2d 1234, 1250 n.27 (5th Cir. 1982). See generally 1 Charles Alan Wright, Federal Practice and Procedure § 142 (1982). Rule 12(f) of the Federal Rules of Criminal Procedure requires a party to raise defenses and objections based on defects in the indictment before trial or waive them absent good cause shown. Even if Malmstrom did object, the six overt acts alleged in the indictment arise from the same offense of bank fraud.

Malmstrom argues that the district court erred in allowing the Government to strike paragraph 3 of Count 12 relating to false documents for the Michelle Henry purchase. Malmstrom moved to dismiss Count 12 on the basis that striking paragraph 3 was an unconstitutional amendment of the indictment and violated his Fifth Amendment right to be tried on charges returned by the grand jury. Malmstrom contends that the grand jury might not have indicted him without the Henry transaction.

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges presented in a grand jury indictment. "Incident to this constitutional guarantee is the longstanding principle of our criminal justice system that the charges contained in an indictment may not be broadened or altered through amendment, except by the grand jury itself." United States v. Restivo, 8 F.3d 274, 279 (5th Cir. 1993). A constructive amendment occurs "when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." United States v. Holley, 23 F.3d 902, 912 (5th Cir. 1994). If an

instruction constructively amends the indictment, we must reverse the conviction. See Restivo, 8 F.3d at 279.

The deletion of one of the alleged acts did not modify the essential elements of the charged offense or broaden the indictment. There was no evidence presented to the jury about the Henry transaction, and the indictment was read with any language related to that transaction eliminated. This "amendment" neither subjected Malmstrom to trial on charges not made in the indictment nor effectively changed the factual basis of the indictment.

4

Pat Malmstrom argues that the district court should have permitted him to call as a witness the deputy district court clerk to substantiate his allegation that there was a secret agreement between the Government and one of its witnesses, Scott Brill, to delay Brill's sentencing. Brill, an alleged co-conspirator, testified on direct examination that the Government made no promises to him outside the plea agreement to delay his sentence. On cross-examination, however, Brill acknowledged that the Government promised to request the court to delay his sentencing until after he testified at trial.

The Government called Special Agent Terry Lane who testified no such promises were made to Brill outside the plea bargain agreement.

Consequently, Malmstrom requested the Deputy District Court Clerk testify as to the relevant dates that Brill pleaded guilty and the various orders continuing his sentence. According to Malmstrom's appeal brief, the evidence was being offered to demonstrate Brill's bias and to impeach Agent Lane's testimony. A review of the record, however, shows that Malmstrom argued that he was not trying to impeach Agent Lane. Malmstrom's counsel stated:

> [T]his doesn't have anything to do with impeaching Mr. Lane. This goes to prove that Mr. Brill was promised that his sentencing was going to be delayed until after he testified in this trial which goes to his bias in testifying for the Government. It's not to impeach anybody.

The Government objected on grounds that it would be highly prejudicial and improper collateral impeachment to have the Deputy District Court Clerk testify. The district court denied Malmstrom's request.

Malmstrom argues that the district court's ruling prevented him from showing bias by Scott Brill and prevented him from impeaching Agent Terry Lane. Although "[t]he partiality of a witness

is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony," United States v. Landerman, 109 F.3d 1053, 1062 (5th Cir. 1997) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)), it is well-established that a district court is afforded broad discretion in determining the probative value of evidence to determine its admissibility. See id. (citing United States v. Abel, 469 U.S. 45, 50 (1984)). In this situation, the district court considered Malmstrom's allegation that there was a secret agreement between the Government and Brill, but concluded that the several continuations of Brill's sentencing were not part of a "secret agreement" because on some occasions the delays were initiated at the direction of the probation officer and through the court. The district court offered Malmstrom the opportunity to make his record by questioning the probation officer outside the presence of the jury, but Malmstrom declined. It was clear from Brill's testimony that, at the time of the trial, he had not yet been sentenced. Given these circumstances, we find no abuse of discretion by the district court.

X

Defendants Caldwell, Cox, Davis, Freeman, Long, Malmstrom, Morrow, Meinzer, and Trout argue that the district court erred by denying their motions for a new trial based on prosecutorial misconduct.[1] Our "task in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict." United States v. Kelley, 981 F.2d 1464, 1473 (5th Cir. 1993). We consider the following: "(1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt." United States v. Tomblin, 46 F.3d 1369, 1389 (5th Cir. 1995). A defendant must show that the prosecutor's statements affected his substantial rights. See id. The district judge's assessment of the prejudicial effect carries considerable weight. See United States v. Munoz, 150 F.3d 401, 415 (5th Cir. 1998), cert. denied, ---S.Ct. ---, 1999 WL 16207, 67 USLW 3458 (U.S. Jan 19, 1999) (No. 98-7239).

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[1] Max Cain's attempt to adopt by reference, pursuant to Fed.R.App.P. 28 (I), the arguments of his co-defendants fails because the issue of prosecutorial misconduct is fact specific.

The district court was concerned about generalizations made about A-1 salesmen and their knowledge. It granted defendants' motion in limine prohibiting the Government from presenting evidence that implied that "it would be impossible to work for A-1 for a week and not know crimes were being committed." The defendants objected approximately 49 times based on alleged violations of this limine restriction, and the district court sustained approximately 23 objections. The defendants argue that the Government's repeated violations severely prejudiced them.

On several occasions, the district court noted it did not find the Government's comments to be violations of the limine motion. For example, the district court explained, "I do not accept the fact that the Government is trying to get away with stuff here," and, "My view is that the Government has been scrupulous in its efforts to abide by my limine motions and my other restrictive orders," as well as, "I do not believe the Government's violation of limine motions when objections have been sustained have in any way caused this case to be unfair." We find no abuse of discretion.

2

Defendants Davis, Freeman, Long, Malmstrom, and Meinzer also claim that the Government grossly misstated the evidence during its rebuttal; that the Government mischaracterized testimony to bolster its argument that everyone at A-1 knew about the fraud; that they were unfairly prejudiced by the Government's conduct.

After reviewing the relevant testimony, we reject the contention. We do not find that any misstatements were of such a magnitude as to impact the defendants' substantial rights or to undermine the correctness of the jury's verdict. The district court here correctly denied the motion for a new trial.

3

Gene Trout complains about the prosecutor's remark during rebuttal that the jury "should be insulted" by Trout's counsel's reading of an FBI 302 statement which Agent Terry Lane took from some mobile home consumers. Trout objected but was overruled. The district court addressed the jury and explained that the "attorneys have acted properly in this case in their efforts to represent their clients." The district court also noted attorneys sometimes use

hyperbole and that the rebuttal remarks by the prosecutor were argument, not evidence. The district court determined that Trout's counsel was not personally attacked and reiterated that Trout's counsel "conducted himself properly in all respects." We find no basis for reversal for prosecutorial misconduct on this issue.

4

Billy Cox complains that the Government's argument as a whole deprived him of a fair and impartial trial. He lists 24 passages that allegedly demonstrate prejudicial prosecutorial misconduct. Cox did not object to 14 of the items listed and some of the other items do not pertain to him. If a defendant fails to object to an improper argument, we will reverse only for plain error. See United States v. Livingston, 816 F.2d 184, 195 (5th Cir. 1987). We find no plain error in any of the passages to which Cox failed to object. As to the remaining 10 passages, we find no basis for reversal because of improper prosecutorial remarks. The district court maintained admirable control over this long, complicated trial and effectively cured any questionable or improper comments by the prosecutor with an instruction to the jury. We are not persuaded that the alleged

prosecutorial misconduct substantially affected the defendants' rights to a fair trial. See United States v. Diaz-Carreon, 915 F.2d 951, 956 (5th Cir. 1990).

5

During its final argument, the Government made generalized comments that it was going to talk about "some undisputed points" and argued those included massive fraud, intent to defraud, conspiracy, and open discussions about short down payments and other falsifications. James Caldwell objected, arguing that these statements by the Government indirectly commented on his failure to testify by labeling the evidence as undisputed. Caldwell avers that the Government's comments were meant to remind the jury that he had remained silent. He also asserts that the Government's comments shifted the burden of proof to him.

We review de novo whether a prosecutor's argument is an impermissible comment on the defendant's right not to testify. See United States v. Martinez, 151 F.3d 384, 392 (5th Cir.), cert. denied, 119 S.Ct. 572 (1998). A prosecutor's remarks constitute impermissible comment on a defendant's right not to testify if the

prosecutor's manifest intent was to comment on the defendant's silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. See id. (citing United States v. Mackay, 33 F.3d 489, 495 (5th Cir. 1994)). Intent is not considered "manifest" if there is an equally plausible explanation of the prosecutor's remark. See United States v. Johnston, 127 F.3d 380, 396 (5th Cir. 1997), cert. denied, 118 S.Ct. 1174 (1998) (citing) United States v. Collins, 972 F.2d 1385, 1406 (5th Cir. 1992). Also, the challenged remarks must be considered in the context of the case in which they are made. See id. (citing United States v. Montoya-Ortiz, 7 F.3d 1171, 1179 (5th Cir. 1993)). Reversal is warranted if the improper comment had "a clear effect on the jury." United States v. Rocha, 916 F.2d 219, 232 (5th Cir. 1990).

After reviewing the record, we find that none of the prosecution's comments expressly discussed Caldwell's failure to testify. Viewed in context, the prosecution's comments neither manifest an intent to comment on the defendant's failure to testify nor would they naturally and necessarily have been interpreted by the jury as a comment on the defendant's failure to testify. See Johnston, 127

F.3d at 396. Further, "commenting on the absence of specific evidence in the record does not constitute a comment on the defendant's failure to testify when witnesses other than the defendant could have testified to such information." Green v. Johnson, 160 F.3d 1029, 1042 (5th Cir. 1998), cert. denied, 119 S. Ct. 1107 (1999) (citing Nichols v. Scott, 69 F.3d 1255, 1284 (5th Cir. 1995); United States v. Fierro, 38 F.3d 761, 772 (5th Cir. 1994)). We hold that the prosecutor's remarks about the undisputed evidence were not improper.

XI

Defendants Barber, Cain, Caldwell, Cox, Davis, Malmstrom, Morrow, and Trout challenge the district court's application of the Sentencing Guidelines.[2] This court reviews a district court's application of the sentencing guidelines de novo and findings of fact under a clearly erroneous standard. See United States v. Lucas, 157 F.3d 998, 1000 (5th Cir. 1998). But cf. United States v. Koon, 518 U.S. 81, 96-100 (1996) (holding that a district court's decision to depart from applicable sentencing range under Sentencing Guidelines

should be reviewed for abuse of discretion, rather than de novo). A defendant's sentence must be upheld unless she demonstrates that it was imposed in violation of the law, was imposed because of an incorrect application of the guidelines, or is outside the range of applicable guidelines and is unreasonable. See United States v. Parks, 924 F.2d 68, 71 (5th Cir. 1991); see also 18 U.S.C.A. § 3742 (f).

1

Section 2F1.1 of the Sentencing Guidelines governs sentence enhancements for offenses involving fraud or deceit. In determining the loss, the application notes provide:

> In fraudulent loan application cases ... the loss is the actual loss to the victim... For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used. U.S.S.G. § 2F1.1, comment. (n.8(b)).

Relying on U.S.S.G. § 2F1.1 and the presentence report, the district court calculated the loss to the bank as the total loan amounts that

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[2] Defendants Freeman, Meinzer, and Long do not raise any sentencing issues in their briefs and attempt to adopt, pursuant to Rule 28(I), the arguments of

were fraudulently procured at each lot. Various amounts were attributed to each defendant based on the dates the individuals started working at A-1 and the loan amount incurred at a specific lot.

The district court concluded that each applicable loan amount manifested "intended loss" because the defendants acted with indifference or reckless disregard by exposing the bank to a loss of the total loan without considering whether repayment could ever be made. The district court relied on United States v. Wimbesh, 980 F.2d 312, 316 (5th Cir. 1993), abrogated on other grounds, Stinson v. States, 508 U.S. 36, 40 (1993), which held that, even though the banks did not lose the full value, the face value of stolen and forged checks was properly used as intended loss because that was the amount at risk.

Defendants Barber, Cain, Cox, Morrow, and Trout argue that the district court erred in its calculation of loss under U.S.S.G. § 2F1.1 by using the "intended loss" instead of the "actual loss." The district court's calculation of loss under § 2F1.1 is a finding of fact reviewable only for clear error. See United States v. Randall, 157

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their co-defendants.

F.3d 328, 330 (5th Cir. 1998) (citing United States v. Tedder, 81 F.3d 549, 550 (5th Cir. 1996)); United States v. Hill, 42 F.3d 914, 919 (5th Cir. 1995) (applying clear error standard of review to an amount of loss finding and specifically rejecting defendant's argument for de novo review based on the legal significance of the facts). Given this standard of review, the only question we must address is whether the record supports the district court's determination that the defendants did in fact intend to inflict a loss in the total amount of the fraudulently obtained loans.

While not fully developed, the record strongly indicates that the "actual loss" to the bank was less than the "intended loss." The defendants argue that they did not intend to defraud the bank of the entire loan amount and that deductions should have been made to account for the loans the bank had been repaid and the amounts that could have been recouped in foreclosures or similar remedies.

When reviewing the calculation of an intended loss, we look to actual, not constructive, intent, and distinguish between cases in which "the intended loss for stolen or fraudulently obtained property is the face value of that property" and those in which the intended

loss is zero because "the defendant intends to repay the loan or replace the property." United States v. Hill, 42 F.3d 914, 919 (1995) (quoting United States v. Henderson, 19 F.3d 917, 928 (5th Cir. 1994)). The case at hand illustrates a situation in which there is neither evidence of actual intent to cause the loss of the entire loan nor evidence of an actual intent to repay the loan. Here, the repayment of the loans was in the control not of the defendants, but of the mobile home consumers. There was no evidence that the defendants intended to repay the loans if the mobile home consumers failed to make their payments. The district court accurately characterized the defendants as "consciously indifferent or reckless" about the repayment of the loans.

In Tedder, a fraudulent loan application case where there was no evidence that the defendant had any control over the repayments, we held that the intended, rather than the actual, amount of loss was the appropriate measure for sentencing purposes. See Tedder, 81 F.3d at 551 ("[W]here the defendant does not intend to repay, and the actual loss is less than the intended loss, ... then the full intended loss is the appropriate basis for calculation."). Likewise, we cannot say

that the district court erred by using the intended, rather than the actual, amount of loss because the defendants in this case had no control over whether the mobile home consumers would repay the loans. Further, we find no basis for finding the district court's reliance on the presentence report clearly erroneous.

2

Under the Sentencing Guidelines, the sentencing range for a particular offense is determined on the basis of all "relevant conduct" in which the defendant was engaged and not just with regard to the conduct underlying the offense of conviction. See U.S.S.G. § 1B1.3. The scope of relevant conduct attributable to a defendant for sentencing purposes is "all reasonably foreseeable acts and omissions of others in furtherance of ... jointly undertaken criminal activity." "Jointly undertaken criminal activity" is defined as "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in the concert with others, whether or not charged as a conspiracy." Id. Each of these determinations ("reasonable foreseeability," "in furtherance," and the existence of "jointly undertaken criminal activity") is factual and therefore is reviewed under the clearly

erroneous standard. See United States v. Hull, 160 F.3d 265, 268-69 (5th Cir. 1998), cert. denied, 119 S.Ct. 1091 (1999).

Co-conspirator liability under § 1B1.3 does not automatically arise because of participation in a conspiracy. See id. At 269. A court must make particularized findings that the elements of foreseeability and scope of agreement have been met. See id. "The scope of jointly undertaken criminal activity for which a defendant is held responsible encompasses 'the specific conduct and objectives embraced by the defendant's agreement.'" Id. (citing U.S.S.G. § 1B1.3(a)(1)(B), comment. (n.2)). Commentary Note 2 provides:

> In order to determine the defendant's accountability for the conduct of others ..., the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake ... In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. U.S.S.G. § 1B1.3(a)(1)(B), comment. (n.2).

We note that " 'the scope of criminal activity jointly undertaken by the defendant ... is not necessarily the same as the scope of the entire conspiracy.'" United States v. Hull, 160 F.3d 265, 270, cert. denied, 119 S.Ct. 1091 (1999) (quoting U.S.S.G. § 1B1.3, comment. (n.2)).

Thus, the question we must review is whether the district court clearly erred in its determination about the existence of "jointly undertaken criminal activity," the actions taken in furtherance of it, and whether those actions were reasonably foreseeable.

The facts of this case show that Max Cain, Billy Cox, and Mason Long acted as the "key men" in the overall conspiracy to defraud the bank in order to obtain loans for A-1 mobile homes. We find that the district court's determination of relevant conduct as to these three defendants was not clearly erroneous.

The district court's assessment of relevant conduct as to the remaining defendants, however, was clearly erroneous. The remaining defendants, Alice Barber, James Caldwell, Sammy Davis, David Freeman, Pat Malmstrom, Tammy Morrow, Larry Meinzer, and Gene Trout, were employed at an A-1 lot (or lots) for a particular amount of time. While the indictment alleged the conspiracy ended on February 1, 1990, the district court attributed losses to these employee defendants from the day they commenced employment with A-1 until April 3, 1990. We note that each employee defendant

appealed the district court's loss calculations,[3] and we conclude that given the facts of this case, the district court committed clear error by including losses beyond the employment period of these individual defendants.

The employee defendants, convicted for fraudulent loan applications, gathered and submitted the false information as a function of their jobs at their particular A-1 lots. Thus, employment was a prerequisite for participation in this conspiracy. Given these circumstances, we find that the scope of the criminal activity each employee defendant agreed to jointly undertake could include only those loans that were processed at the particular lot (or lots) at which that defendant was employed.

The Sentencing Guidelines offer an analogous illustration:

> Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion.

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[3] Although challenges to the application of the Sentence Guidelines are generally fact-specific and cannot be adopted by reference pursuant to Fed.R.App.P. 28(I), we find in this instance that the challenge to the district court's loss calculations are not fact-specific. The challenge raises the general question of whether to assess the defendants with losses occurring at time periods other than those during which they were employed and does not require us to make any fact-specific inquiries.

> Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery). U.S.S.G. § 1B1.3, illus. (5); see also U.S.S.G. § 1B1.3, illus. (7).[4]

Like the girlfriend in the illustration, each defendant engaged in "jointly undertaken criminal activity" consisting only of those transactions that occurred while the defendant worked for A-1. Once the employment ended, the criminal activity ceased being "jointly undertaken." Just as the girlfriend, who was aware of her boyfriend's on-going drug enterprise, was "not accountable" for her boyfriend's other drug sales because the other sales were not in furtherance of her jointly undertaken criminal activity (the one delivery), on the unique facts before us these particular defendants ought not have charged to their sentencing account fraudulent loans "made after leaving the employ of A-1." They were sufficiently aware of the ongoing activity to be found guilty of joining a conspiracy. Their employment was the door to that participation.

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[4] We note that illustrations, like commentary, are generally binding on the courts. See U.S.S.G. § 1B1.7, comment. ("Portions of [the Guidelines Manual] not labeled as guidelines or commentary … are to be construed as commentary and thus have the force of policy statements."); Stinson v. United States, 508 U.S. 36, 38 (1993) (holding that the "commentary in the Guidelines Manual that interprets

Accordingly, we must vacate the sentence of Alice Barber, James Caldwell, Sammy Davis, David Freeman, Pat Malmstrom, Tammy Morrow, Larry Meinzer, and Gene Trout and remand for resentencing using each defendant's date of employment as the outside boundary in which to calculate the losses attributable to each one. That calculation must keep the inside boundaries in mind. Specifically, a defendant's relevant conduct does not include conduct of others occurring before a defendant joined the criminal venture because it is not "reasonably foreseeable." U.S.S.G. § 1B1.3(a)(1)(B) comment. 2; see also United States v. Carreon, 11 F.3d 1225, 1235-38 (5th Cir. 1994). The district court must determine, by a preponderance of the evidence, the date that each defendant joined and left the criminal venture. See U.S.S.G. § 6A1.3, comment. (explaining that due process requires that facts relevant to sentencing be proved by a preponderance of the evidence). After determining the proper dates, the district court should again apply the intended loss findings based on the amount of loans fraudulently procured at each lot. In other words, the losses attributed to each defendant will be the

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or explains a guideline is authoritative unless it violates the Constitution or federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

total amount of fraudulent loans procured during the defendant's applicable dates and at the particular lot(s) at which the defendant was employed or a lesser period in which he was employed but had not joined the illegal activity.

3

James Caldwell argues that the district court attributed losses to him that occurred before the date of his first alleged overt act in the conspiracy, which was June 8, 1988. The district court found him responsible for losses incurred from February 16, 1988 (his employment began on February 4) until the end of the conspiracy. The Government argues that the district court did not err because Caldwell's presentence report offered evidence to support the conclusion that Caldwell was a knowing participant in the bank fraud scheme throughout his employment.

We have held that a district court can adopt facts contained in a presentence report without inquiry, if those facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence. See United States v. Puig-Infante, 19 F.3d 929, 943 (5th Cir. 1994). The defendant has the burden of showing that

information that the district court relied on in sentencing is materially untrue. See id. We find that Caldwell has failed to meet his burden. Moreover, the district court did not clearly err in its determination that Caldwell joined the conspiracy shortly after he began working for A-1.

4

Malmstrom's presentence report contained statements about FBI records documenting fraudulent activity which the probation officer researched on microfiche and determined were in fact fraudulent.[5] Malstrom argues that the district court improperly used these findings, which were not elements of the charged offenses, and deprived him of the right to confront witnesses and cross-examine them on these alleged facts. As Malmstrom concedes, the Supreme Court has not decided whether the Sixth Amendment Confrontation Clause applies to sentencing proceedings.

Confrontation rights at sentencing hearing are restricted. See United States v. Rodriquez, 897 F.2d 1324, 1328 (5th Cir. 1990). In

[5] The prosecution explained to the sentencing court that each of the loans listed in the probation report was determined to be fraudulent due to short down payments according to interviews with other defendants or purchasers.

this case, the findings of the presentence report, which the court adopted, were supported by evidence from the trial and investigative research by the FBI and the probation office. "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Malmstrom failed to rebut the presentence report with any evidence other than an argument that all the loans listed were not fraudulent. Objections in the form of unsworn assertions do not bear sufficient indicia of reliability to be considered. See United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). Because any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy," and because Malmstrom was given the opportunity at the sentencing hearing to present evidence to the contrary, we find that Malmstrom's confrontation rights were not abridged. United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1991).

Pat Malmstrom worked at the Waco A-1 for three months as a salesman while he was in college. Gene Trout worked at the Bryan A-1 for three months as a salesman. They argue that the district court erred by refusing to grant them a two level reduction pursuant to U.S.S.G. § 3B1.2(b) for being minor participants. Samantha Davis, who worked only 4 weeks at the Bryan A-1 and was acquitted of the conspiracy charge, argues that she deserved a four level reduction as a minimal participant. The Government argues that the district court did not err in evaluating each of these defendants' fraudulent activity as "average" and determining that these defendants were not less culpable than most of the others.

Section 3B1.2 of the Sentencing Guidelines is designed to reduce a sentence when the defendant is substantially less culpable than the average participant in the offense. See United States v. Edwards, 65 F.3d 430, 434 (5th Cir. 1995). Section 3B1.2 provides:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> > (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

A judicial fact-finding that a defendant is not a minimal or minor participant is reviewed under the clearly erroneous standard. See United States v. Pofahl, 990 F.2d 1456, 1485 (5th Cir. 1993). Given this standard and § 3B1.2's comment that "a downward adjustment for a minimal participant will be used infrequently," U.S.S.G. § 3B1.2, comment. 2, we must affirm the district court's determination.

Davis also argues that the district court erred by including a two level upward adjustment for involvement with more than minimal planning under U.S.S.G. § 2F1.1(b)(2)(A). The guidelines define "more than minimal planning" as "more planning than is typical for commission of the offense in a simple form," or "[taking] affirmative steps . . . to conceal the offense." U.S.S.G. § 1B1.1, comment. (n. 1(f)). She claims that the district court failed to make adequate findings to support this upward adjustment.

A district court can adopt facts contained in a presentence report without inquiry, if those facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence. See Puig-

Infante, 19 F.3d at 943. Here, we find that the presentence report was sufficiently reliable and Davis failed to present any rebuttal evidence. Therefore, we review the district court's determination of "more than minimal planning" for clear error. See United States v. Brown, 7 F.3d 1155, 1159 (5th Cir. 1993). We find none.

6

James Caldwell argues that the district court should not have included in its calculation of his criminal history category his three uncounseld misdemeanor convictions for DWI and theft offenses that each resulted in actual imprisonment. He relies on Nichols v. United States, 511 U.S. 738, 748-49 (1994), which provides, "[A]n uncounseled misdemeanor conviction, valid under Scott [v Illinois], [6] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction..." Caldwell reasons from Nichols that because he **was** imprisoned, his misdemeanor convictions cannot be used to enhance his punishment. We find Caldwell's reasoning flawed because the focus of the Nichols holding

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[6]In Scott, the Supreme Court held that as long as no imprisonment was actually imposed, a defendant's Sixth Amendment right to counsel did not apply. See Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

is not on whether the defendant was imprisoned, but on whether the conviction was validly obtained. See, e.g., United States v. Hoggard, 61 F.3d 540, 543 (7th Cir. 1995).

The Sixth Amendment protects the principle that no imprisonment may be imposed on the basis of an uncounseled conviction, unless the defendant waives his right to counsel. The record demonstrates that Caldwell signed a waiver of counsel for each of his prior convictions that resulted in jail time.[7] Therefore, the three uncounseld convictions were validly obtained. We find that the district court did not err by including Caldwell's three uncounseled convictions in its calculation of his criminal history category.

XII

The judgments of conviction are affirmed. The sentences of Max Cain, Billy Cox, and Mason Long are affirmed. The sentences of Alice Barber, James Caldwell, Sammy Davis, David Freeman, Pat Malmstrom, Tammy Morrow, Larry Meinzer, and Gene Trout are vacated, and the case is remanded to allow the district court to impose new sentences in accordance with this opinion.

AFFIRMED IN PART and VACATED IN PART.

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[7]At the sentencing hearing, Caldwell argued that his waivers were involuntary, but he makes no such argument on appeal.